JUL 18 1956
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 259

HIRAM DWOSKIN, Alias HIRAM DEE,
Petitioner,

vs.

STATE OF NEBRASKA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
AND
ENTRY OF APPEARANCE AS COUNSEL

E. D. O'Sullivan, Sr., and
David S. Lathrop,
Attorneys for Petitioner.

INDEX

	Page
Petition for Writ of Certiorari	1
Citations to Opinion Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provisions and Statutes Involved	3
Statement	4
How Federal Questions Were Presented	7
Reasons for Granting Writ	8
Conclusion	13
Entry of Appearance of Counsel	14
Appendix	15

CASES CITED

Carty, et al., vs. U. S., 190 F. 2d 99	9
DeJonge vs. Oregon, 299 U. S. 353	10
Dwoskin vs. State, 161 Neb. 793, 74 N. W. 2d 847	1
Edgerton vs. U. S., 143 F. (2d) 697	9

CONSTITUTIONAL PROVISION CITED

United States Constitution, Article 14	3

STATUTES CITED

Revised Statutes of Nebraska, Sec. 57-313	3
Revised Statutes of Nebraska, Sec. 29-2016 (7)	4
28 U. S. C., Section 1257 (3)	2

TEXT BOOK CITED

55 Am. Jur., Vendor and Purchaser, Sec. 12, p. 480	10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

o———o———o

No. ———

o———o———o

HIRAM DWOSKIN, Alias HIRAM DEE,
Petitioner,

vs.

STATE OF NEBRASKA,
Respondent.

o———o———o

PETITION FOR WRIT OF CERTIORARI
AND
ENTRY OF APPEARANCE AS COUNSEL

o———o———o

PETITION FOR WRIT OF CERTIORARI

The petitioner, Hiram Dwoskin, respectfully prays that a Writ of Certiorari issue to review the judgments of the Supreme Court of Nebraska, entered in the above entitled case on February 10, 1956, and April 21, 1956.

CITATIONS TO OPINION BELOW

The opinion of the Supreme Court of Nebraska, contained in Appendix A hereto, *infra*, p. 15, is reported in 161 Neb. 793, 74 N. W. 2d 847.

JURISDICTION

The jurisdiction of the Supreme Court is invoked under 28 U. S. C., Section 1257(3), which provides in part: "(3) By Writ of Certiorari . . . where any title, right, privilege or immunity is specifically set up or claimed under the constitution . . ." The judgment sought to be reversed was entered on February 10, 1956. Within the time allowed by the rules of the Supreme Court of Nebraska a Request for Rehearing was filed. This was overruled by the Court on April 21, 1956.

Petitioner made a timely request to withhold the mandate and the same was allowed and the mandate withheld until July 20, 1956, pending filing of petition for Writ of Certiorari.

QUESTIONS PRESENTED

1. Was the petitioner denied due process under the Fourteenth Amendment to the United States Constitution?

(a) Where the Court, after the submission of all the evidence and the arguments of counsel substantially altered the issues of the case by the omission of a phrase and a strained definition of the remaining issue, and

(b) Where the petitioner is given the benefit of counsel after the jury was selected but before opening statements were made and such counsel is denied a continuance to the next morning to acquaint himself with the issues.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution of the United States of America, Article XIV, Section I:

". . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; . . ."

Nebraska Revised Statutes, Section 57-313:

"Whoever (1) by false pretense or pretenses, or by a promissory representation as to some future action to be taken by the person making the representation where made with the present intent that such future action would not be performed or carried out, shall obtain from any other person, corporation, association or partnership, any money, goods, merchandise, credit or effects whatsoever with intent to cheat or defraud such person, corporation, association, or partnership of the same; or whoever (2) shall sell, lease or transfer any void or pretended patent right or certificate of stock in a pretended corporation and take the promissory note or other valuable thing of such purchaser; or whoever (3) shall fraudulently make and transfer any bill, bond, deed of sale, benefit or grant or other conveyance to defraud his creditors of their just demands; or whoever (4) shall obtain the signature or endorsement of any person to any promissory note, bank draft, bill of exchange, or any other instrument in writing fraudulently or by misrepresentation, if the value of the property or promissory note or written instrument or credit, fraudulently obtained or conveyed as aforesaid, shall be thirty-five dollars, or upwards, shall be imprisoned in the penitentiary not more than five years nor less than one year; but if the value of the property be less than thirty-five dollars, the person so offending shall

be fined in any sum not exceeding one hundred dollars or be imprisoned in the jail of the county not exceeding thirty days, and be liable to the party injured in the amount of damage sustained."

Nebraska Revised Statutes, Section 29-2016(7):

"The Court after the argument is concluded shall immediately and before proceeding with other business charge the jury, which charge or any charge given after the conclusion of the argument shall be reduced to writing by the Court, if either party requests it before the argument to the jury is commenced; and such charge or charges or any other charge or instruction provided for in this section, when so written and given, shall in no case be orally qualified, modified or in any manner explained to the jury by the Court; and all written charges and instructions shall be taken by the jury in their retirement and returned with their verdict into Court, and shall remain on file with the papers of the case."

STATEMENT

The petitioner is engaged in the real estate sales and construction business in the City of Omaha, Nebraska. Early in 1951 the petitioner entered into a written contract with a Mr. and Mrs. Leo Kemler to construct a residential home on certain real estate owned by them. At the time of the execution of the contract Mr. and Mrs. Kemler paid to the petitioner the sum of $4,400.00 and executed a real estate mortgage to him in the sum of $9,000.00. The defendant immediately set about the construction of the home, but during the course of the construction a dispute arose between Mr. and Mrs. Kemler and the petitioner. It seemed to have arisen by reason of mechanic's liens being placed on the property. Mr. and Mrs. Kemler gave to the defendant, as a result of this dis-

pute, the option to repurchase the property for the sum of $5,500.00 and subject to all encumbrances of record.

The option, by its own terms was to expire on November 4, 1952. However, the petitioner had oral assurances from the attorney for Mr. and Mrs. Kemler that if he should care to purchase the property for the indicated sum he could still do so. On December 6, 1952, the defendant entered into a purchase agreement with the complaining witnesses Mr. and Mrs. William L. Sudyka, whereby he, for $3,000.00 down payment, and a mortgage for the balance agreed to sell to Mr. and Mrs. Kemler the subject property for the sum of $14,900.00. The property was not at this date entirely completed and he agreed to perform the necessary work to complete the property. Within a very few days after this purchase agreement was entered into the petitioner returned to the owners of the property and obtained a further written evidence of his right to purchase the property. After entering into the purchase agreement with Mr. and Mrs. Sudyka the petitioner undertook to complete the construction of the home in accordance with his agreement. During the progress of the work between December 6, 1952, and the latter part of January the purchaser made several visits to the house and selected the colors of paint, selected the lineolum and finishing material for the house and was offered the keys on February 1, 1953, but did not take them.

The purchaser conferred with his attorney and testified that he was advised by his attorney not to go through with the purchase of the property and demanded his three thousand dollars ($3,000.00) be returned to him.

The petitioner eventually executed a note in the sum

of $3,000.00 and a mortgage on another piece of property.

The information filed against the defendant charged: "did falsely pretend to William L. Sudyka and Louella L. Sudyka that the Allied Finance System, a Corporation, was the owner of or had the power to execute a conveyance of . . . that neither Allied Finance System nor Hiram Dwoskin, alias Hiram Dee, were the owners of the said property; that neither the Allied Finance System nor Hiram Dwoskin, alias Hiram Dee, had any authority to contract for the sale of such property or the power to a conveyance of such property. . . ."

After all of the State's evidence was in and the State had rested its case the petitioner made a Motion for Directed Verdict which was overruled. The petitioner elected to rely on the insufficiency of the State's evidence and the case proceeded to arguments. After arguments to the jury by counsel, the Court for the first time, indicated by its instructions that the question of "ownership" or "authority to contract for the sale" were not to be submitted to the jury, leaving only the issue of "power to execute a conveyance."

By Instruction No. 8 the Court defined the phrase "power to execute a conveyance" to mean "the present opportunity and ability under all the surrounding facts and circumstances which you find to exist in this case to procure the legal title and to transfer it to another, or the present opportunity or ability to direct and cause the title to be transfered to another."

As late as the morning of trial the petitioner had not retained counsel to defend the case or to consult with him

or represent him in any way. However, after the empaneling of the jury and before the opening statements were made, Mr. Thomas Walsh of the Douglas County Public Defender's Office was appointed to represent the petitioner. After the opening statements to the jury which was nearly noon on the first day of the trial, Mr. Walsh requested a continuance until the following morning so that he might acquaint himself with the transactions involved in the case. This request for a few hours continuance was denied by the Court and Mr. Walsh proceeded to assist the petitioner with what information he presumably was able to gather during the lunch hour.

HOW FEDERAL QUESTIONS WERE PRESENTED

The question concerning the denial of due process by the trial Court in the alteration of the issues was first raised in the Motion for New Trial (R. 24), then in the hearing on the merits in the Supreme Court of Nebraska (R. 251), and in the Motion for Rehearing (R. 259).

The federal aspect of this question was not raised until the Motion for Rehearing. This motion was overruled on April 21, 1956, and the Supreme Court of Nebraska thereby passed specifically on the federal question and the same was determined adversely to the petitioner.

The federal question concerning the failure to give petitioner's counsel a continuance is raised here for the first time, but it is a substantial question affecting the fundamental rights of petition and should be passed upon.

REASONS FOR GRANTING THE WRIT

QUESTION I

The conduct of the trial Court in this case and the affirmance by the Supreme Court of Nebraska is such as to deprive this petitioner, now under a four year sentence, of any semblance of a fair trial. The alleged trial was a mere summary proceeding characterized by the Court "lying in wait" for the defense and then framing a new issue by its instruction to justify the submission of the case to the jury.

It is charged in the Infromation that the defendant:

> "did falsely pretend to William L. Sudyka and Louella L. Sudyka that the Allied Finance System, a corporation, was the owner of or had the power to execute a conveyance of . . . that neither Allied Finance System nor Hiram Dwoskin, alias Hiram Dee, were the owners of the said property; that neither the Allied Finance System nor Hiram Dwoskin, alias Hiram Dee, had any authority to contract for the sale of such property or the power to execute a conveyance of such property. . . ."

In Instruction No. 2 the Court undertook to read the charge made in the Information to the jury. It is significant to note that the Court, in reading the charge, omitted the words "was the owner of or" when referring to the alleged pretenses of the defendant.

In defining the words "power to execute a conveyance," the Court said that this phrase means

> "the present opportunity and ability under all the surrounding facts and circumstances which you find to exist in this case to procure the legal title and to transfer it to another, or the present opportunity

and ability to direct and cause the title to be transferred to another."

The Court, therefore, substantially altered the allegations of the information in two essential particulars which the defendant had theretofore defended against:

1. The charge that the defendant pretended to be the owner of the property.

2. The charge that the defendant had the power to execute a conveyance, which assertion might have been true, and the defendant's ability to procure by specific performance or other means, the legal title and transfer it at a *later date* would have been a complete defense.

In the case of *Carty, et al., vs. United States,* 190 F. 2d 99, the Court, in its Instructions, altered the issues as framed by the charge and the Ninth Circuit Court of Appeals said:

> "Notwithstanding, we believe, the jury might have found defendants guilty of the charge as laid, this Instruction amended the Information and defendants were tried on a charge different from that which they were called to defend from the language thereof. We cannot therefore speculate upon how much weight the jury may have given to the Instruction . . . nor is this a technicality. The giving of the Instruction constituted a flagrant abuse of due process."

The same principle is announced in the case of *Edgerton vs. United States,* 143 F. 2d 697, where the Ninth Circuit Court of Appeals condemned the trial Court's alteration of the indictment by the omission of certain words, stating that:

> "the submission to the jury for consideration in reference to the evidence of a count which has been altered by the omission of a phrase is, in effect, to try the defendants on a charge not found by the Grand Jury and it is this result which comes within the principle of the Bain case." (Ex Parte Bain, 121 U. S. 1, 7 S. Ct. 781 30 L. Ed. 849.)

The Carty case and the Edgerton case seem to refer to the Fifth Amendment which, of course, has no direct application to the State Court procedure. However, we find the case of *DeJonge vs. Oregon*, 299 U. S. 353, 81 L. Ed. 278, which announced the principle that "a conviction upon a criminal charge not made is a denial of due process." This case arose on certiorari from the State Court of Oregon and is obviously authority for the fact that if the trial Court alters the issues of criminal prosecution by the substitution of issues at the time of instruction, that due process as guaranteed by the United States Constitution, presumably the 14th Amendment has been violated.

This case was defended upon the charge made on the Amended Information on the theory as announced in 55 Am. Jur., Vendor and Purchaser, Sec. 12, p. 480, that:

> "It is not unusual for persons to agree to convey by a certain time, notwithstanding they have no title to the land at the time of the contract and the validity of such agreements is upheld. In such cases, the vendor assumes the risk of acquiring the title and making the conveyance, or responding in damages for the vendee's loss of his bargain. One having an option to purchase real estate has a legal right to enter into an executory contract to sell the property. A fortiori, it is not necessary that the vendor be the absolute owner of the property at the time he enters into the agreement of sale. An equit-

able estate in land, or a right to become the owner of the land, is as much the subject of sale as is the land itself, and whenever one is so situated with reference to a tract of land that he can acquire the title thereto, either by the voluntary act of the parties holding the title, or by proceedings at law or in equity, he is in a position to make a valid agreement for the sale thereof, without disclosing the nature of his title."

Nowhere in any of the documents found in this case or in any of the defendant's alleged pretenses did he claim to have the present ability to convey, but spoke only of a conveyance at a future date. The purchase agreement between the defendant and the complaining witness, dated December 6th, is in the form of an offer to purchase by the complaining witness, on the condition that the defendant have a good and valid title on the date of closing, and it is significant that no date of closing was ever indicated.

There is one significant factor and that was an apparent interruption in the defendant's right to purchase the property from Mr. and Mrs. Kemler. Had the defendant known that the case would go to the jury on the question of his right to purchase the property from Kemlers on December 6th, he undoubtedly would not have rested at the end of the State's case, but would have adduced evidence of his oral assurances from Kemler's counsel as to his right to purchase for the sum of $5,500.00. Relying upon the issues as framed by the Information, he rested at the end of the State's case only to find that the jury was instructed that the case hinged upon his ability to convey on December 6th. In the words of those in the athletic pursuits, the defendant was

"faked out of position." This is expressed in affidavit of assistant public defender (R. 261).

"STATE OF NEBRASKA }
COUNTY OF DOUGLAS } ss.

"I, THOMAS J. WALSH, beng first duly sworn upon my oath depose and say, that I am a practicing attorney in the City of Omaha, Douglas County, Nebraska; that I am now and have been for two years last past employed by Douglas County on the staff of the Douglas County Public Defender; that I assisted Hiram Dwoskin, also known as Hiram Dee, in the defense of the above captioned case; that I entered the case after the commencement of the voir dire examination of the jury; that the cause was defended upon the allegations of the Information and at the close of the State's case there had been no amendment, either by way of addition to or deletion from the Information; that the first time I was aware that the allegation of "ownership" had been eliminated from the Information was when the instructions were read to the jury; that I based my final argument to the jury largely upon the question of ownership, assuming at all times that it was part of the charge made against the defendant.

"Further affiant saith not

/s/ Thomas J. Walsh.

"Subscribed in my presence and sworn to before me this 7th day of March, 1956.

/s/ David S. Lathrop,
Notary Public.

SEAL

"I HEREBY CERTIFY that I served a copy of this Affidavit on the Attorney General of the State of Nebraska by mailing same to his office with sufficient postage to assure the delivery of same on March , 1956.

/s/ David S. Lathrop."

We sincerely feel that this was an alteration of the issues as framed by the Amended Information and that the alteration deprived the defendant of due process of law as guaranteed him by the United States Constitution.

QUESTION II

The remaining federal question concerns the failure of the trial Court to grant a few hours continuance to petitioner's appointed counsel so that he might acquaint himself with the transactions involved..

Counsel was appointed for petitioner between the empaneling of the jury and the making of opening statements (R. 61-65). Counsel had no previous knowledge of the case.

The conduct of the trial Court and the affirmance by the Supreme Court of Nebraska was a denial of petitioner's right to due process guaranteed him by the Fourteenth Amendment of the United States Constitution and was in direct conflict with the case of *Powell vs. Alabama*, 287 U. S. 45.

The holding of Powell case is that the right to representation by counsel is not satisfied by last minute appointment of attorney regardless of his ability and that the right to counsel also implies an opportunity for such counsel to prepare himself.

The failure of trial Court to recognize this right not only denied petitioner a fair trial but is further indicative of Court' determination to assume the role of an advocate for the State rather than a guardian of petitioner's rights.

CONCLUSION

The foregoing reasons and each of same this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

E. D. O'Sullivan, Sr., and
D. S. Lathrop,
278 Aquila Court,
Omaha 2, Nebraska,
Counsel for Petitioner.

APPEARANCE OF COUNSEL

The Clerk of the Supreme Court of the United States will please enter my appearance in the above entitled case as one of the attorneys for the petitioner herein.

Eugene D. O'Sullivan,
278 Aquila Court,
Omaha, Nebraska.

APPENDIX A

Heard before Simmons, C. J., Carter, Messmore, Yeager, Chappell, Wenke, and Boslaugh, JJ.

MESSMORE, J.

The plaintiff in error, hereinafter called the defendant, was convicted of obtaining money by false pretenses and was sentenced to serve 4 years in the State Penitentiary. He brings the record of his conviction to this Court for review,

The amended information, in substance, charged that Hiram Dwoskin, alias Hiram Dee, did falsely pretend to William L. Sudyka and Louella L. Sudyka that the Allied Finance System, a corporation, was the owner of or had the power to execute a conveyance of Lot 6, Block 4, Phillips' Addition to the City of Omaha, Douglas County, Nebraska, also described as 2419 South Tenth Street, Omaha, Nebraska; that by such false pretenses the defendant did induce William L. Sudyka and Louella L. Sudyka to enter into a contract with the Allied Finance System and defendant for the purchase of said property and to pay to Allied Finance System and defendant the sum of $3,000 in money as a down payment on the purchase price of said property; that neither the Allied Finance System nor the defendant were the owners of said property; that neither the Allied Finance System nor defendant had any authority to contract for the sale of such property or the power to execute a conveyance of such property; that relying upon such false pretenses, William L. Sudyka and Louella L. Sudyka did pay and deliver $3,000 in money to the Allied Finance System and defendant; that the Allied Finance System and defendant received the $3,000 in money; and that

such pretenses were false and made with the intent to defraud William L. Sudyka and Louella L. Sudyka.

The charge was brought under Section 28-1207, R. R. S. 1943. So far as material here, the statute provides: "Whoever (1) by false pretense or pretenses, or by a promissory representation as to some future action to be taken by the person making the representation where made with the present intent that such future action would not be performed or carried out, shall obtain from any other person, * * * any money, * * * with intent to cheat or defraud such person, * * *." The statute then provides for punishment of the offense.

The gist of the offense is described in *Brennan v. State*, 141 Neb. 205, 3 N. W. 2d 217, as follows: " 'In a prosecution for obtaining money by false pretenses the gist of the offense consists in obtaining the money of another by false pretenses, with the intent to cheat and defraud.' Ketchell v. State, 36 Neb. 324, 54 N. W. 564; reaffirmed in Thompson v. State, 112 Neb. 389, 199 N. W. 806."

The defendant elected to try his own case. He was assisted, in part, by an attorney from the public defender's office.

At the close of the State's evidence, the defendant moved for a directed verdict of acquittal and predicates error on the part of the trial court in overruling this motion. This raises the question of the sufficiency of the evidence to submit the case to the jury, which may be summarized as follows.

By stipulation of the parties, the Allied Finance System and the Equity Holding Company are Nebraska

corporations. The evidence clearly indicates that the defendant was the sole and complete owner of these corporations, and there is no evidence to the contrary. We make this observation at this time for the reason that both the Allied Finance System and the Equity Holding Company will be mentiond subsequently in the opinion.

The record discloses that Leo J. Kemler and Lillian Kemler, his wife, acquired title to Lot 6, Block 4, Phillips' Addition to Omaha, Douglas County, Nebraska, by warranty deed from Jens Dahl Jensen and Marie Jensen, husband and wife, executed on March 5, 1951. The property is also known as 2419 South Tenth Street. Kemler testified that in March, 1951, he entered into a contract for the construction of a house on the property, with the defendant, the Built-Rite Company, and paid the defendant $4,400, making the last payment around July, 1951. In addition, he executed a mortgage to the Allied Finance System, a Nebraska corporation, on March 5, 1951, in the amount of $9,000. He dealt only with the defendant when he dealt with the Allied Finance System. A dispute arose between Kemler and the defendant apparently with reference to liens that might be placed against the property. As a result of this dispute, a contract was entered into between Kemler and his wife and the Allied Finance System on August 4, 1952. By the terms of the contract Kemler and his wife were to sell to the Allied Finance System the property in question for $5,500, the purchaser agreeing to buy the property subject to all encumbrances of record or any encumbrances that might be placed thereafter on the property, and to close the purchase on or before 90 days after the date of the agreement.

Kemler further testified that he never had any conversation, correspondence, or communication of any kind with the defendant or the Allied Finance System after August 4, 1952, or before December 6, 1952, with reference to William L. Sudyka and Louella L. Sudyka; that he never sold the property; and that he did not own it at the time of the trial.

On cross-examination Kemler testified that he was represented by an attorney, and that after August 4, 1952, his attorney had correspondence with the defendant with reference to the property in question. Kemler's attorney wrote a letter dated December 10, 1952, to the defendant in care of the Built-Rite Company, informing the defendant that the attorney had a deed to the property heretofore described, made by Leo J. Kemler and Lillian Kemler, husband and wife, conveying the property to the Allied Finance System, and would deliver the deed to the defendant upon the payment of $5,500, on condition that the amounts named in the letter were paid within a reasonable time, not to exceed 30 days from the date of the letter.

On January 30, 1953, Kemler's attorney wrote to the defendant referring to the attorney's letter of December 19, 1952, and stating that the purpose of the letter was to amend the letter of December 19, 1952, and informing the defendant that the deeds mentioned in that letter and the amounts specified were paid by February 15, 1953.

On re-direct examination Kemler testified that on or after February 15, 1953, he never executed any document with reference to the sale of this property to the defendant or the Allied Finance System, nor had any conversation with the defendant; that the option, as evi-

denced by the letters, was never exercised by the defendant; that he never received from the defendant or the Allied Finance System, or anybody else at any time after December 6, 1952, any money from the sale of this property; that after the property was sold, his fendant for $5,000; that Kemler received a total of $447.40 from the defendant; and that no further money was paid on this note.

William L. Sudyka testified that he contacted the defendant by a telephone call and made an appointment with him to look over the property in question as it had a "for sale" sign on it, by Built-Rite. The defendant did not keep the appointment, and 2 weeks later, on December 6, 1952, this witness called the defendant again and made an appointment to go to defendant's place on North Thirtieth Street. He met the defendant and asked him what he wanted for the property, and the defendant told him that he would have to have some money for a down payment. The witness said that he had $3,000. They then proceeded to the house and looked it over. The interior was not finished. The defendant said he wanted $14,900 for the house. After looking over the house this witness, his wife ,and the defendant went to the defendant's place of business. The defendant then told this witness: "That is a nice place, * * * I will sell it to you, * * *I will fix it and I will have the floors in and the walls painted." He referred to the property as his house. He also said he would have it fixed up by January 1, 1953. Negotiations were carried on and a contract was entered into which was a purchase agreement whereby Sudyka and his wife agreed to purchase the property here involved from the Allied Finance System, the same to be completed in accordance with specifications which were designated on the reverse side

of the contract, subject, however, and on condition that the owner thereof had a good and valid title, in fee simple, and would furnish abstract of title down to the date of the sale, and convey said premises by warranty deed, land contract for deed, the purchaser agreeing to pay $14,900, the terms being $3,000 payment with contract and balance payable at the rate of $72 per month, together with interest on the unpaid balance. All payments made were to apply on interest first and the balance on the principal. Payments of $72 were to start February 1, 1953, and continue until the principal and interest were paid in full. Said property was to be delivered to purchaser free and clear of all encumbrances and taxes due and payable. Then the seller agreed to close the purchase in accordance with the contract, and the date was not designated when the closing would occur. There are other elements of the contract not necessary to mention, except that it shows that Sudyka, on December 6, 1952, paid $3,000 to apply on the purchase price of the property. A check for $3,000, dated December 6, 1952, payable to the Allied Finance System by William L. Sudyka, bearing the endorsement of the Allied Finance System is in evidence as the down payment on the property.

William Sudyka further testified that he believed and relied upon the defendant's representation and defendant's statement that he would sell the house to him; and that at no time during any of these transactions were the names of Mr. or Mrs. Kemler mentioned to him, nor that there was a mortgage on the property, nor that mechanic's liens had been filed against the property. It does appear from the evidence that during the period when the house was being constructed and prior to December 6, 1952, mechanic's liens in the amount of $3,974.07 had been filed against the property. He further testified

that he made no payments on the house after December 6, 1952; that he did have a conversation with the defendant in February or March with reference to moving some furniture into the house; that the house was not finished and he did not move the furniture in; and that he did not receive a deed from the defendant or from the Allied Finance System, or receive any part of his money back.

The defendant proceeded to cross-examine this witness extensively, against the advice of his technical adviser or assistant. This cross-examination revealed very little, if anything, different from the testimony of the witness on direct examination, except to say that the defendant and the witness went to some loan companies to obtain a mortgage which they were unable to obtain, and that the witness' attorney told him not to move into the property.

Louella Sudyka corroborated and substantiated the testimony of her husband, William L. Sudyka, in every detail, and testified that she was with him at all times when he had any transactions with the defendant with reference to the property.

Warren Tunis testified without objection on the part of the defendant, contrary to the advice of his technical adviser or assistant. The testimony of this witness, and of the witness Julius Van Hoenacker which is summarized later, has reference to transactions between these witnesses and the defendant subsequent to the transaction with William L. Sudyka and Louella L. Sudyka, his wife. The court cautioned the jury that this type of testimony would be admitted for one purpose only, that is, with reference to the question of the intent on the part of the defendant in connection with the transaction

in question, and the court instructed the jury to the same effect.

This witness testified that in October, 1953, he had a conversation with the defendant at defendant's office. He looked at the property in question. The defendant told him it had been built for some time and the transaction did not go through, so it was available if the witness wanted to buy it; that he owned it and built it; and that he would also build a garage and arrange for a mortgage. The name of Kemler was never mentioned when the negotiations were entered into. Nothing was said by defendant about a mortgage or mechanic's liens at that time, nor about a lawsuit being filed to foreclose the liens against the property. On October 3, 1953, an agreement for a warranty deed was entered into by and between this witness and his wife and the Equity Holding Company, Inc., with reference to the purchase of the property in question for $14,900, cost of the house and land, and cost of new improvements and land $2,750, with a down payment of $1,000, and $200 a month. The $1,000 was paid down by this witness by check to the Equity Holding Company at the time of entering into the agreement. He never received a deed from the Equity Holding Company. He moved into the property, took possession, and lived there for a few weeks. On cross-examination by the defendant this witness testified that he endeavored to make cancellation of his agreement for failure on the part of the seller to perform the terms thereof, and adjusted the matter by receiving a refund of $850, allowing a fee for services rendered to date.

A deputy register of deeds testified to the deed from the Jensens to the Kemlers; tht the next deed was dated on February 24, 1954; and that no other instrument was

filed on that property during the interval of time between the recording of the Jensen-to-Kemler deed and February 24, 1954, with the exception of mechanic's liens and a mortgage.

Julius Van Hoenacker testified that he met the defendant while he was walking around the premises on a Sunday afternoon in the last part of December, 1953, or the fore part of January, 1954. The defendant and his son were working on the sunporch and invited the witness into the house. Later the defendant told the witness that he was in trouble. The defendant did not tell this witness who owned the property. He said nothing about any mechanic's liens, or about a lawsuit filed with reference to foreclosing some liens. An agreement was entered into January 22, 1954, between this witness and his wife, and the Equity Holding Company for the purchase of the premises for $12,000, $50 at the time the contract was signed, $4,950 on January 25, 1954, and $7,000 after the delivery of the deed. This witness further testified that he did not receive the deed to the premises from the defendant or the Equity Holding Company.

There is a stipulation in the record setting forth the dates of a number of mechanic's liens filed against the property in question on October 15, 1951, and in January, March, August, October, and November, 1952. An action was brought to foreclose these liens. A decree of foreclosure was entered, sheriff's sale had, sale confirmed, and all the lienholders were foreclosed of all equity of redemption, right, title, interest in, or lien upon the real estate.

The defendant argues that the State failed to produce any evidence of the defendant's pretense that he

had power to execute a conveyance. The evidenc shows that the only connection the defendant had with the real estate in question prior to August 4, 1952, was that he contracted to build a house thereon for the owners. Thereafter a dispute arose between the owners and the dfendant. On August 4, 1952, the owners and the de-defendant. On August 4, 1952, the owners and the defendant entered into a contract of purchase, giving the defendant the right to purchase the property within 90 days from the date of the contract. There was nothing said nor done with reference to the contract between the parties to the agreement prior to December 6, 1952. On that date the defendant contracted to sell the property to William L. Sudyka and Louella L. Sudyka, and took a $3,000 payment down. The contract between the defendant and the owners, by its terms, had expired on November 2, 1952. There was no extension of the contract giving the defendant an option to purchase the property from November 2, 1952, to December 6, 1952. The record discloses that there is no evidence that defendant ever intended to exercise the option to purchase the property as provided for by the contract. Obviously the defendant had no title, nor did the Allied Finance System, of any kind to the property involved in this case on December 6, 1952. The defendant or the Allied Finance System were in no position to sell or contract to sell the property. This being true, the defendant or the Allied Finance System did not have the legal right or power on December 6, 1952, to execute a conveyance of the property to the Sudykas. The written contract of purchase entered into between the Sudykas and the Allied Finance System and defendant specified with reference to the property here involved "that the owner hereof has a good and valid title, in fee simple." The defendant told the Sudykas: "I will sell you my house * * *."

The defendant relies on *Graf v. State*, 118 Neb. 485, 225 N. W. 466. In that case Graf, defendant, and one Krauss entered into a contract for the exchange of properties. Pursuant thereto Krauss endorsed a note owned by him, secured by a chattel mortgage, and delivered the note and chattel mortgage to the defendant, and also delivered to defendant warranty deeds executed by Krauss and his wife on lands owned by him. At the same time the defendant executed and delivered to Krauss a warranty deed for the lands which defendant claimed he owned. At that time the defendant held a contract for the purchase of the lands he claimed he owned, and had paid thereon the sum of $500. A deed had been executed by the owner of the record title to this land, in which the defendant was named as grantee, and deposited in escrow, to be delivered to the defendant upon payment by him of the balance of the purchase price, amounting to $3,100. Some time after the making of the contract for and exchange of deeds between Krauss and defendant, the defendant voluntarily made payments aggregating more than $1,100 on his contract for the purchase of the land he had agreed and attempted to convey to Krauss. The court indicated that this evidence tended to negative the charge that the defendant had an intent to cheat or defraud, but stated it was a question for the jury. The court went on to what it considered a more serious question—that it was charged in the information that the defendant represented that he was the owner and holder of the record title to the land which he was to convey to Krauss. The defendant did not state that he was the owner of the record title. At most, the evidence showed that the defendant said he owned the land and referred to it as "my land." The court said: "The word 'owner' is one of wide and extensive meaning when applied to real estate. It includes

a rightful proprietor; one who owns the fee; one who has an estate less than a fee; any one who owns an estate in lands; the person entitled to the legal estate; any one who has an equitable right to or interest in land, or one who has any right which, in law or equity, amounts to ownership in the land." Under the facts in the case, the court said: "We think it must be conceded that defendant had an equitable interest in the land by virtue of he contract and deed to him in escrow from the owner of the legal title, * * *. In view of the testimony of Krauss, the complaining witness, that defendant did not at any time represent to him that he was the owner of the record title, * * *:" The conviction obtained in the district court was reversed and dismissed.

In the case of *Graf v. State, supra,* the defendant had a valid and enforceable option on which he made two payments in the amount of $1,600. In the instant case the option had expired, and no payments were made on the contract. In the instant case the contract stated that the seller had a good and valid title in fee simple at the time the false representation was alleged to have been made. There was no claim made by the defendant Graf that he had the power to execute a conveyance. The definition of the word "own" or "owner," as set forth in *Graf v. State, supra,* certainly has no application under the facts and circumstances of the instant case. The facts in *Graf v. State, supra,* are distinctively different than those in the instant case. This is likewise true in the cases of *Eselin v. State*, 113 Neb. 839, 205 N. W. 570, and *State v. Eudlay* (Mo.), 188 S. W. 110, relied upon by the defendant, which have been considered and found to be inapplicable to the instant case.

In the instant case the seller did not even have an enforceable right to purchase the property when the

money was obtained from the Sudykas, and was in default of any such right and unable to exercise the right to purchase. There were liens totaling nearly $4,000 filed against the property in question, and a mortgage outstanding in the amount of $9,000. None of these facts were revealed to the Sudykas. The evidence substantiates the charge in the information that the defendant and Allied Finance System, which he owned, had no power to execute a conveyance on December 6, 1952.

We said in *Potard v. State*, 140 Neb. 116, 299 N. W. 362: "When the necessary elements of the crime are sustained by evidence, the question of the intent with which the transaction was carried on is usually one for the jury to determine after a consideration of all the facts and circumstances. The fact that additional representations may have been made relating to future transactions are material only as circumstances to be considered by the jury in determining the question of intent."

Where the essential elements of the crime of obtaining money by false pretenses are present, it is no defense that the defendant had an option to buy the property on which he made default. See, *Brennan v. State, supra*; *Hameyer v. State*, 148 Neb. 798, 29 N. W. 2d 458; *State v. Pierson*, 47 Del. 397, 91 A. 2d 541; *State v. Stanley*, 116 Kan. 449, 227 P. 263; 22 Am. Jur., False Pretenses, s. 51, p. 471. We conclude that the evidence was sufficient to submit to the jury the charge filed against the defendant as alleged in the amended information.

The defendant predicates error in the giving of Instruction No. 8 by the trial court, which reads as follows: "The words 'power to execute a conveyance' of

the real estate involved herein, as used in these instructions, mean the present opportunity and ability, under all the surrounding facts and circumstances which you find to exist in this case, to procure the legal title and to transfer it to another, or the present opportunity and ability to direct and to cause the title to be transferred to another."

The defendant contends that this instruction unduly restricted the definition of "power to execute a conveyance" and thereby created a false issue under the facts in the instant case. The amended information charges that the defendant falsely pretended that he, or a company owned by him, "was the owner of or had the power to execute a conveyance of" certain real estate. There was no objection made by the defendant to the form or substance of the information, and any such objection has been waived. See *Thompson v. O'Grady*, 137 Neb. 641, 290 N. W. 716.

The instruction complained of relates to the present opportunity and ability to procure and transfer the legal title to the real estate involved on December 6, 1952. The jury was required to determine what representations were made by the defendant on that date and what he was able to do with respect thereto. This was a proper instruction when considered with all the other instructions in the case. The following is applicable.

In *Kirkendall v. State*, 152 Neb. 691, 42 N. W. 2d 374, the court said: "Where instructions, considered as a whole, state the law fully and correctly, error will not be predicated therein merely because a separate instruction, considered by itself, might be subject to criticism." See, also, *Vanderheiden v. State*, 156 Neb. 735, 57 N. W. 2d 761.

For the reasons given in this opinion, we conclude that the verdict of guilty and judgment entered thereon should be and are hereby affirmed.

AFFIRMED.

FILED
NOV 2 1956
JOHN T. FEY, Clerk

IN THE
SUPREME COURT OF THE UNITED STATES

October Term - 1956

- o -

No. 259

- o -

HIRAM DWOSKIN
Also Identified as Hiram Dee

vs.

STATE OF NEBRASKA

- o -

PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI

- o -

Hiram Dwoskin

Appearing Pro See

THIS PAGE BOUND VERTICAL IN BOOK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term-1956

- o -

No. 259

- o -

HIRAM DWOSKIN
Also identified as Hiram Dee
Petitioner

vs.

STATE OF NEBRASKA
Respondent

PETITION FOR REHEARING OF
PETITION FOR WRIT OF CERTIORARI

and

ENTRY OF PETITIONER APPEARING PRO SEE

- o -

APPEARANCE OF PETITIONER WITHOUT COUNSEL

Comes now the Petitioner, Hiram Dwoskin, appearing pro see in behalf of himself in the above-entitled case and alleges that he was not financially able to secure an attorney who is qualified to represent him in this honorable Court, and is therefore, obliged to appear in behalf of himself and respectfully prays that this honorable Court grant him every possible consideration within the province of this Court and jurisdiction authorized by the Constitution of the United States.

The Petitioner hereby certifies that he is appearing in good faith and not for delay, and that the grounds for the petition are in full compliance with all rules applicable to these proceedings.

THIS PAGE BOUND VERTICAL IN BOOK

JURISDICTION

It is the Petitioner's sincere belief that he is within his Constitutional rights in requesting the Court to rehear the Petition for Writ of Certiorari.

The Petitioner further alleges that he is in compliance with Rules 19, 20 and 58 of the Revised Rules of the Supreme Court of the United States, effective at this date. Nov. 2, 1956 (Adopted April 12, 1954)

1. Rule 19: Grants jurisdiction on Writ of Certiorari in cases where the lower Court has so far departed from accepted and usual course of judicial proceedings, or so far sanctioned such departure by a lower Court as to call for an exercise of this Court's power of supervision.

2. Rule 20: A writ of Certiorari to review a case will be granted upon showing that the case is of such imperative public importance as to justify the deviation from normal appellate process and to require immediate settlement of this Court.

3. Rule 58, Paragraph 2: A Petition for Rehearing of Order on Petition of Order - on Petition for Writ of Certiorari may be filed with the Clerk of the Supreme Court of the United States in term time subject to the requirements respecting time, printing, number of copies provided, manuscript signature to certificate and service as provided in paragraph (1) of the Rule --

> "Any petition filed under the paragraph must briefly and distinctly state grounds which are confined to intervening circumstances of substantial or controlling effect, or to other substantial grounds available to petitioner although not previously presented."

The jurisdiction of the Supreme Court invoked under 28 - U.S.C. Section 27(3) which provides in part; "(3) by Writ of Certiorari . . . where any title right, privilege of immunity is specifically set up or claimed under

the Constitution."

The judgment sought to be reversed was entered on Feb. 10, 1956, within the time allowed by the rules of the Supreme Court of Nebraska, a Request for Rehearing was filed. This was overruled by the lower Court on April 21, 1956.

Petitioner made a timely request to withhold the mandate and the same was allowed and the mandate withheld until July 20, 1956, pending filing of Petition for Writ of Certiorari which was denied by the Supreme Court of the United States on October 8, 1956.

Petitioner is now out on bond of good and sufficient surety called for at $3,000.00 and is at the mercy of the Court for a stay of execution of judgment until final disposition of petition for Rehearing of Petition for Writ of Certiorari.

The Petitioner humbly and respectfully prays that the Writ of Certiorari be granted and in support of petition the following grounds are submitted for the consideration of the Court.

GROUND FOR REHEARING OF ORDER ON PETITION FOR WRIT OF CERTIORARI

1. The Petitioner was denied due process of law, as is the right of all citizens of the United States of America as guaranteed by the 14th Amendment to the United States Constitution --

> "Constitutional provisions and Statutes, Constitution of the United States of America, Article XIV, Sec. 1;
>
> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law."

The Petitioner is an innocent victim of prejudice and circumstances beyond his control, which were imposed on him by a radical change in rising cost of material and labor, and the constant change of mortgage

conditions and because of his sincere desire to satisfy his customers and creditors he personally volunteered to assume obligation of corporation that he had small interests in, and he has thereby suffered great losses, and is now indebted to many, who might become victims of great losses unless the Petitioner is at liberty to earn and satisfy those that have placed trust in him and his ability as an architect and builder. In spite of prejudice by the lower Court and adverse newspaper publicity, they all feel confident that the honorable Supreme Court of the United States will consider the merits of this case and will reverse the verdict of the lower Courts.

The Petitioner is innocent of any false pretense for the sequence of his business transaction and those referred to in this case definitely prove that a customer always had the right to cancel his contract subject to the resale of the property they contracted for, and upon the sale of the property reimbursement and payment to all concerned be made to satisfy all.

Every judge and every attorney in the City of Omaha know that the Petitioner is absolutely innocent -- absolutely free from guilt or intent of false pretence or any wrong doing -- and everyone knows that the so-called trial was prejudiced and did not give the Petitioner a chance to present the true facts in the case. The one newspaper publicity pressure during the time of the trial has innocently misguided the Judge and jury; the result of which created a great injustice against an innocent man.

The Petitioner prays that the Court further investigate the

true facts of the case and the procedure in error in order that the honor and the Constitutional rights of the Petitioner be protected and thereby any injustice may be avoided.

The Petitioner further prays that the honorable Supreme Court of the United States grant him additional opportunity and the privilege to submit briefs and oral argument in support of the facts in this case which are in his favor.

This Petition is in addition to the Petition of Record for Writ of Certiorari together with transcript on file.

Respectfully submitted,

Hiram Dweskin ps. Lee

November 2, 1956

IN THE
SUPREME COURT OF THE UNITED STATES

Office - Supreme Court, U.S.
FILED
NOV 5 1956
JOHN T. FEY, Clerk

HIRAM DWOSKIN
Also Identified as Hiram Dee

vs.

STATE OF NEBRASKA

--- • ---
No. 259
--- • ---

MOTION
FOR LEAVE TO FILE
TYPEWRITTEN COPIES OF
PETITION FOR REHEARING

Comes Now - the Petitioner Hiram Dwoskin appearing pro se - in behalf of Himself in the above-entitled case - and respectfully prays that the Honorable Supreme Court of the United States kindly accept the Petitioner's typewritten copies of Petition for Rehearing of Petition for Petition of Writ of Certiorari in lieu of filing printed copies.

The Petitioner respectfully prays that the Court grant him every possible consideration - due to the fact that he is not financially able to have the printing done, for the Petitioner's burden of expense and loss of business and undue hardship has left him without funds -- and without legal council.

The Petitioner, therefore, humbly begs that the Honorable Supreme Court of the United States, please grant the acceptance of filing typewritten copies of Petition for Rehearing of Petition for Writ of Certiorari.

Respectfully submitted,

Hiram Dwoskin
pro se

THIS PAGE BOUND VERTICAL IN BOOK

IN THE
SUPREME COURT OF THE UNITED STATES

HIRAM DWOSKIN
Also Known as Hiram Dee
Petitioner

vs

STATE OF NEBRASKA
Respondent

No. 259

SUPPLEMENT TO PETITION FOR REHEARING OF PETITION FOR CERTORARI

Office - Supreme Court, U.S.
FILED
NOV 17 1956
JOHN T. FEY, Clerk

SOLICITATION:

Comes Now - the Petitioner Hiram Dwoskin and respectfully begs the Honorable Supreme Court of the United States to consider his request for a rehearing of Petition for Certorari and to further substantiate and support the righteousness and sincerity of his request the Petitioner humbly submits important facts which were not presented at the time of the trial due to prejudice and interference by the County Attorney's Office and the District Judge L. Ross Newkirk of the District Court, Douglas County, State of Nebraska.

Related events of continuity in this case shown in the transcript will fully support any and all allegations which the Petitioner is presenting to the Honorable Judges of the Supreme Court of the United States.

The Petitioner is not an attorney, and being that his future and destiny are now at the mercy of the Honorable Supreme Court of the United States, and whereas, he is not financially able to engage competent legal representation, said petitioner humbly and respectfully appears pro see.

The Petitioner is considered a respectable and righteous citizen of the United States and has always tried his best to uphold high standards of ethics in dealing with all fellowmen. The Petitioner would rather undertake a financial loss himself than to permit any of his customers to lose any money. It has always been his aim to complete a job that he starts to the final satisfaction of his purchasers, for in all walks of life, whatever we do is a public service and we are all compensated according to results we produce.

THIS PAGE BOUND VERTICAL IN BOOK
POOR COPY

The Petitioner, Hiram Dwoskin, is now a victim of a great injustice about to be done, and he is in fear of losing his freedom and liberty as granted to all by the Constitution of the United States wherein the rights of all people are protected by the authority of the Honorable Supreme Court of the United States, as guardian of righteousness for all.

Comes now the Petitioner, and alleges that the County Attorney of Douglas County, State of Nebraska, and District Judge L. Ross Newkirk, together with a few unethical attorneys, have created a miscarriage of justice which requires the attention of the Supreme Court of the United States. Such an injustice if permitted would create a hazard to freedom and liberty as provided in the Constitution of the United States.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution of the United States of America, Article XIV, Section I:

> ".....No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law;....."

The Petitioner is established in the real estate and construction business in the City of Omaha, State of Nebraska, and has done business under the name of Dee Construction Company, with interest in the Built-Rite Corp., Prefab Manufacturers, and a small interest in the Allied Finance System and Equity Holding Co., Inc., mortgage and real estate investments.

The Petitioner's activity in the real estate business started during the time of the O.P.A. days when the need for housing throughout the country

was very urgent, and he has discontinued employment in the architectural division of the U. S. Engineers -- during the year 1942, in order to help with the shortage of housing for the colored population. The Petitioner consented to accept priorities from the F.H.A. for the building of 80 units upon land that he had acquired, being an area of approximately four square blocks which was the former carnival grounds of the City of Omaha. That particular area was considered the recognized "Mason and Dixon Line" of Omaha, Nebraska.

It seemed that almost from the beginning when I acquired the property I have unknowingly interfered with a post war program of some influential people in Omaha, and because I have made commitments to build housing for the colored people on this ground I have refused to entertain an offer to make that property available for the building of a stadium and eventually the stadium was built on the south side of the city and I have created for myself enemies, among some of the influential people in the City of Omaha.

The ground I owned was valuable property and being centrally located there was a constant demand for this property for other purposes which would have been more profitable for me. Yet, in order for me to keep a promise and fulfill my commitments, I have sacrificed the opportunity of making larger profits in order to help a people that no one else wanted to help.

The so-called influential group, attorneys and businessmen, with the aid of the one newspaper in the city, created an undercurrent of prejudice and a local gossip that the Dee Construction Company is building a "ghetto" for the colored people. I was terribly hurt with such accusations and I have employed an investigator who formerly worked for the Urban League, in order to secure a community analysis and reason for the undercurrent of gossip.

THIS PAGE BOUND VERTICAL IN BOOK

Investigation proved that there were two major objections to the development.

1. The residents of the nearby community were making every effort possible to move westward to new communities and make their older homes available to the colored people, and the Dee Construction Company Development under an F.H.A. Program with a 10% investment to the purchaser and the balance F.H.A. mortgage for twenty years would create a competition that the owners of older homes would not compete with and, therefore, would make it difficult for real estate brokers to sell the old homes, which has created a natural trend of competitive prejudice.
2. The adjacent population of colored people who bought older homes and were renting out almost every room in the house and crowding one family homes to three and four family accommodations were also fearful of the consequence in possibly losing some tenants in the event the Dee Construction Company would succeed in completing their development, and, for their selfish reasons Mr. Dee who is trying his best for people who needed equal consideration has overnight become accused of building a "ghetto" for colored people. In spite of the fact that the homes he was building for the colored people were as good and better than any other homes built at that time for the restricted sales price of $6,000 - $8,000, and the records of the Federal Housing Administration and inspections will fully support my claim.

THIS PAGE BOUND VERTICAL IN BOOK

Sequences of events followed and being that we were building during the period of O.P.A. and F. H. A. regulations we were obliged to sell before building within the ceiling restrictions but when the O.P.A. discontinued enforcement and was dissolved by the government all prices for materials and labor increased 40 to 62%. Our contracts were definite and we were immediately faced with increased costs of labor and material and no additional increase in price from our purchaser.

We have strenuously tried to fulfill all commitments and naturally favored the purchasers who were considerate and who needed the cooperation and there were some who recognized that their purchase would mean a profit to them on a re-sale that tried legal pressure for faster completion in spite of the fact that their order was entered at a later date. To those that were belligerent and were looking to make a profit on their purchase we have adopted a policy for cancellation and refund of their money and re-purchase of any land that they have bought from us if they wish to sell and the purchaser who needed a home for himself with no desire to take advantage of a situation in profiting from our hardship, to them we have rendered service and taken the loss.

Fortunately, we were able to sell part of our tract of land for commercial purposes and the profits helped pay for some of the losses.

The Petitioner has continued with the strenuous program of working almost sixteen hours per day in order to establish an honorable business with a strict policy of quality construction, practical design, and a satisfied customer, but the constant change in government regulations as to mortgages, change of interest, and restrictions has kept most of my time occupied in making plans for customers, supervising construction, purchasing of materials, office administration, negotiating finance and other required work in order to fulfill commitments.

THIS PAGE BOUND VERTICAL IN BOOK

POOR COPY

THIS PAGE BOUND VERTICAL IN BOOK

In all of our dealings we have tried sincerely to avoid litigation. However, we have always maintained the policy of accepting cancellations at any time during the period of construction if a purchaser so desires for some reason or another for it often happens that persons may order a two bedroom home and find themselves in need of a three bedroom home three or four months later. The cancellation was permitted subject to an arrangement whereby the original purchaser would be reimbursed when the property is re-sold. That way, no one is hurt and no one loses. It is my personal opinion that such a procedure is fair and honorable.

The Petitioner humbly asks that the Honorable Justices of the Supreme Court of the United States please be patient and considerate of the circumstances which are being related to you in order that the Petitioner gain due consideration and relief from the honorable high tribunal in order that he may again regain his freedom and liberty which he justly is entitled to.

The Petitioner is married and has fortunately been blessed with a loyal wife -- a fine lady -- and we have four lovely children; three boys and one girl, all honor students. "For all the Creator has done for us we are very grateful and thankful."

Our older son -- now 21 1/2 -- is in the Air Force "Photo Intelligence Section" and has recently received another promotion. He was in his third year of college before he joined the service.

Our second son -- now 20 years -- is in the Navy, and is now on a destroyer in parts untold. (We hope that the troubled area will decide on a peaceful settlement in order to avoid any further complication.) This son was also in his third year of college before joining the service. He is a scholarship student with the University of Chicago.

Both of our sons decided to join the service in order to complete

their obligation to the government and then, if possible, to continue with their studies. (The undisclosed fact was that they could not take the embarrassment of publicity against their father.)

Our daughter is 16 1/2 years old now, in her last year in High School.

Our youngest son is 13 1/2, in the first year of High School.

Our children are all honor students, well behaved, and highly respected by their fellow students, and the community. The hardship they are all living through is too difficult for me to explain, for it would only bring more tears to my troubled heart.

The publicity and embarrassment to the family has caused my elder boys to quit college in their third year. My wife and I have lost a fortune in property, and we are left in a debt of more than $53,000.

All these difficulties have been caused by a few unscrupulous, unethical attorneys, who pressured the County Attorney's office and the presiding judge into establishing the County Attorney's office as a collection agency under threat of prosecution and conviction — depriving people of their liberty and freedom.

That is a proven fact, as records of this case definitely show. The rights of all citizens are in danger, with such corruption in our judicial system in some of the lower courts. Allowing such practice of law to continue is a violation of constitutional rights and we are in danger of permitting additional corruption of law in our lower courts, where favoritism to political authorities has long been evident, and where the spectacular of publicity is a factor for reelection.

The Petitioner humbly requests the Honorable Judges of the Supreme Court of the United States to please consider the merits of the Petitioner's allegations and in support thereof the following is respectfully submitted.

THIS PAGE BOUND VERTICAL IN BOOK

JURISDICTIONAL AUTHORITY OF THE SUPREME COURT OF THE UNITED STATES

As Understood by the Average Citizen, and Respected Throughout the World

Whenever the constitutional rights of the United States has been violated -- and the freedom and liberty of an individual is in danger -- and thereby creating hardship to innocent people -- and when no relief could be secured in the lower Court, that individual has a right to present his case to the highest Court in this land of freedom -- the Supreme Court of the United States -- for consideration, and if found innocent the Supreme Court of the United States will reverse that decision and direct dismissal of the entire case; thereby reestablishing liberty and freedom to that citizen.

For that reason; we all "Pledge allegiance to our Flag, and to the Country for which it stands, with liberty and justice for all."

ALLEGATIONS

1. Comes now the Petitioner, Hiram Dworskin, and alleges that the County Attorney in Omaha, Douglas County, Nebraska, has willfully and knowingly made wrongful accussations without fact or proof, and without proper service, and has brought to trial an innocent man, who was without attorney, and, although an attorney was appointed by the Court, that attorney was not familiar with the case, and when he asked for additional 24-hours continuance to prepare for the trial, this request was denied. This one ground is sufficient to prove violation of constitutional rights.

2. Amended information given to Petitioner a few minutes before trial commenced, and not giving defendant sufficient time to prepare for amended complaint, is also abuse of discretion, and a denial of a continuance as requested before the District Court of Douglas County in Omaha, Nebraska -- also a violation of judicial procedure unbecoming to a Court of Justice.

THIS PAGE BOUND VERTICAL IN BOOK

4. Statutes of the State of Nebraska, Section 28 - 1207, Revised Edition 1943, requires that there must be proof of intent to defraud, in order to prosecute.

All facts and testimony as shown in the records definitely prove that there was no intent to defraud. Sequence of all future transactions definitely prove that the defendent was sincere and cooperative in all of his business negotiations and never intended to hurt anyone or cause anyone to lose any money.

5. The Lower Court erred in permitting the County Attorney's statement as to ownership of corporations and such was entered in the records alleging that the Defendent, your Petitioner, was sole owner of certain corporations, whereas the Petitioner is a minority stockholder and was not given a chance to testify as to true ownership of the Corporation.

6. Every judge in the City of Omaha and every attorney familiar with this case all know that the Petitioner, the Defendent in this case, is an honorable gentleman and sincere in all of his business transactions and is definitely free of any wrong doing (any accusations made to the contrary are without foundation and proof).

A thorough investigation has established the main reason for the conviction was prejudiced publicity and preasure from a few unethical attorneys who wanted to prove that they are politically powerful.

Submitting their names and causing more complications would not be advisable unless same is requested by the Court for it is not my intention to hurt anyone in spite of the fact that they have maliciously hurt me and my family. I have painfully learned that hurting one means embarrassment and hardship to the innocent people and their entire families.

THIS PAGE BOUND VERTICAL IN BOOK

The same people including the County Attorney and the Presiding Judge of the District Court would like to undo the wrong and injustice that they have done to me and my family. If only they could do so and save face and not hurt themselves. That statement has been made to me by several honorable, ethical members of the Omaha Bar Association who were interested in learning the reason for the unnecessary conviction.

7. The facts and the question of this case are the errors made by the Lower Court. The Petitioner also was advised that the Lower Court was without jurisdiction to try this case and that the Statutes of Limitations under the Criminal Act had expired. In spite of the fact that there actually never existed an action in the Criminal Court for the matter was strictly of a civil nature and all the transactions have previously been legally and righteously negotiated and all contracts on record with The Register of Deeds Office in Omaha, Douglas County, Nebraska, properly notarized and agreed to by all parties in their Attorneys' office.

8. History of actual facts relating to the case in question:

(a) Purchaser No. 1 contracts for the building of a home in an older neighborhood on filled ground. The Purchaser No. 1 received this lot as a gift from his father-in-law and in order not to hurt his father's-in-law feelings he insisted on the building of a house on this lot whereas the same money could have built for him a house in a newer, finer neighborhood. The purchaser and his wife are nice people, average education, and reading magazines which give them ideas for the finer things in a home. As progress of the work continued the purchaser often came to the office and on the job requesting certain extras and agreed to pay for same.

When the house was about fifty per cent completed the purchaser's mother-in-law met with an accident in her own home which incapacitated her and it became necessary for the purchaser's wife to insist on selling

THIS PAGE BOUND VERTICAL IN BOOK

COPY BOUND CLOSE IN CENTER

their equity in the new home and stay with mother in their large home for she was the one and only daughter.

Arrangements were made at their attorney's office for the establishing of their equity. Consideration and an agreement were made for them to give title to the Allied Finance System, a Nebraska Corporation since 1939. Upon the payment of certain monies when and if the property is sold to another purchaser, and there was a definite understanding that because of location the time required for re-sale be stipulated for ninety days and if additional time is required such extension will be granted by the attorney. This attorney is an honorable gentleman, ethical in his methods of doing business and is highly respected. His word and promise have always been honored.

(b) Prior to the expiration of ninety days, there were several negotiations pending for the re-sale of that property and finally, within ten days after the expiration, a contract was negotiated with Purchaser No. 2, who was negotiating with us prior to the expiration of our contract for purchase. The attorney for Purchaser No. 1 was notified and he has, at a later date, transmitted to us a letter extending the option and agreement to re-purchase. The Petitioner then made necessary progress to complete the house which was fifty per cent finished at that time and the monies advanced by Purchaser No. 2 were invested in labor and material for the completion of that house. In spite of the fact that the Petitioner obligated himself and the Corporation to pay any and all subcontractors any additional amount when the property is completed and mortgage money becomes available.

When the house was completed and all work was done to the satisfaction of Purchaser No. 2, the house was offered to them for occupancy subject to the final negotiations of mortgage or land contract, whichever would be made available for the balance due. In the meantime it was definitely understood that in order to maintain their credit the payments due each and every month must be made in escrow. Such was not done by the purchaser

and soon thereafter an attorney for Purchaser No. 2 called the Petitioner. When I came to see this attorney, he belligerently demanded immediate cancellation of the contract which was, at that time, about 120 days old and work completed and all monies expended for the completion of that home and I politely asked that attorney "why the cancellation now". This attorney clearly and definitely stated that for the sum of $14,000.00 his client could afford to buy a home in a newer neighborhood in spite of the fact that it costs just as much to live in an older neighborhood and it definitely costs more to build on filled ground.

The house was nice, well designed, modern, and had all the accommodations that anyone would wish for and I felt sure that there would be less difficulty in the re-sale of this property now than before when the house was fifty per cent complete. I have agreed to an agreement of cancellation subject to re-sale. However, the attorney said that he would prefer that my wife and I give him a mortgage of $3,000 on an income property that my wife, at that time, owned in order to protect his client for the $3,000 refund in the event that the property bought by Purchaser No. 2 is not sold or sufficient monies could not be secured to pay all obligations.

I, the Petitioner, was obliged to agree to this arrangement and phoned my wife to come to the attorney's office in order to sign the mortgage jointly with me and in the meantime the necessary mortgage, notes, and agreement were being prepared by the attorney. When my wife arrived the papers were signed in the presence of the attorney, Purchaser No. 2, and a notary public. These papers were duly filed of record with the Register of Deeds in Omaha, Douglas County, Nebraska, the following day by the attorney representing Purchaser No. 2.

The Petitioner humbly begs the honorable justices of the Supreme Court of the United States to please be patient and considerate of the circumstances which involved the Petitioner in dispute with the attorney for Purchaser No. 2.

The property which my wife and I have mortgaged to Purchaser No. 2 was delinquent in taxes, together with an incumbrance of about $8,000, including the mortgage of $3,000 to Purchaser No. 2, which incumbrance the attorney knew about before accepting the mortgage. The value of the property was $14,000, and was producing an income of $200 per month.

It is customary that when a property is more than two years delinquent the office of tax collection usually starts proceedings of foreclosure subject to a lien for taxes, and at that time all holders of equity become parties to that legal instrument. Such was the case within about 120 days after the mortgage was given to the attorney of Purchase No. 2.

Before the foreclosure was completed and before the sale, we paid the delinquent taxes and asked for a dismissal of the foreclosure; which dismissal was granted to us. However, the attorney for the purchaser No. 2 objected to that procedure and insisted that he had already established his claim of indebtedness on this property and that a note for $3,000 and the mortgage of record is all due on demand, and he therefore demanded that the sale be reinstated in spite of the fact that we had paid our taxes.

The attorney, however, assured me that the property could easily be sold for $8500 to satisfy all liens and that he himself was willing to bid on that property, and advance the necessary money which he received title which he would hold in trust with the understanding that he be reimbursed his investment at 6%, plus 10% additional for services rendered because in this case he did not want to charge Purchaser No. 2 any fees. This attorney assured me that when he acquired title to this property he would

THIS PAGE BOUND VERTICAL IN BOOK

hold same in trust until the time that he and his client received full reimburse ment. That the property will revert back to my wife. This was agreeable -- and when I asked him to prepare an agreement he said we did not need any, and that I could take his word for it -- which I agreed to do.

Thirty days following this property was again offered for sale under foreclosure proceedings and I started a bidding at $5,000. The many professional bidders, knowing that the property belonged to my wife, did not want to hurt us and did not bid. And a few outsiders who did bid stopped at $5200 and the final bid was $5250, which I made. I was then instructed by this attorney to stop at this point, and he would accept title to the property and advance the money, and pay Purchaser No. 2 the $3,000 owed to him, as he had anticipated to invest at least $8500. A few days later I had occasion to meet with this attorney and I asked him whether he had paid Purchaser No. 2. He told me, "You have no written agreement with me. I bought the property in my name together with another party as an investment -- and we intend to keep it." I immediately filed objections to the confirmation of sale and in spite of all my efforts to stop confirmation we lost the property and I am now deeply in debt. Soon thereafter came the pressure of the County Attorney's office and complaint was filed by Purchaser No. 2.

I have tried to repurchase the property from this attorney. I have negotiated for mortgage money in the sum sufficient enough to reimburse the attorney, and Purchase No. 2, plus a profit of $1,000 to him, but he refused to sell. At a later date we were offered $11,500 for the property without equipment. We have taken this purchaser to the attorney and asked him to complete this sale and to please pay Purchaser No. 2 and take the profit for himself. The result if the property was sold to that buyer and Purchaser No. 2 was never paid, and we never received a dime.

Now comes the Petitioner and prays that the honorable Supreme Court of the United States please analyse and consider the circumstances involved in this case. It is almost unbelievable that an attorney would be so unethical in his dealings as to go the extreme of taking our money, and his client's money

-- all legally, he claims, and now tries to take my liberty and freedom with pressure and political influence in the County Attorney's office and others whom he is able to support for reelection. Now it is after Election -- and all who have done this attorney's bidding are reelected. It may be a coincidence, but it is also a fact.

Now comes the Petitioner, Hiram Dworskin, and humbly begs the Supreme Court of the United States to further review the following.

The records show that a duly certified and authenticated transcript of all pleadings and proceedings pertaining to this case, together with all of the documentary records from the office of the Clerk of the District Court of Douglas County, Nebraska, and from the office of the Clerk of the Supreme Court in the State of Nebraska, have all been filed with the clerk of the Supreme Court of the United States, and all documents and transcripts of all pleadings are made a part hereof as fully and completely as if set forth herein.

The Petitioner alleges that there is reversible error in the trial proceedings, the verdict of the jury and the judgment of the Court in the following matters, and each of said matters, which materially affect the substantial rights of your plaintiff in error and which prevented him from having that fair and impartial trial which is guaranteed to him under the Constitution of the State of Nebraska, and the applicable portions of the Constitution of the United States and the Amendments thereto:

1. Because of irregularities in the proceedings of the Court.

2. Because of irregularity in the proceedings of the witnesses for the State.

3. Because of irregularity in the orders of the trial court.

4. Because of abuse of discretion by the trial court by which the defendant was prevented from having a fair and impartial trial.

5. Because of misconduct of the jury, which was influenced by

the foreman of the jury who was later discovered prejudiced.

6. Because of misconduct of the Prosecuting Attorney, which is self evident in the trial proceedings, as shown in the records and transcript.

7. Because of misconduct of the witnesses for the State, which said misconduct is evidenced by false statements as influenced and instructed by County Attorney.

8. Because of accident or surprise, which ordinary predence could not have guarded against, which said accident or surprise was evidenced by the prejudice of the presiding judge, whose cooperation and fairness was expected and depended on.

9. Because the verdict is contrary to law.

10. Because the verdict is contrary to the evidence.

11. Because the verdict is not sustained by the evidence.

12. Because the verdict is not sustained by sufficient evidence.

13. Because the State failed to prove the corpus delecti or crime by evidence beyond a reasonable doubt as required by law.

14. Because the evidence produced by the State or otherwise appearin in the record relating to the essential elements of the offense and each of them was not as to each and all of said essential elements of the offense of such probative force as to amount to proof of guilt by evidence beyond a reasonable doubt as required by law.

15. Because of newly discovered evidence material for the defendent which he could not with reasonable diligence have discovered and produced at the trial, which said newly discovered evidence will be presented to the Court by oral testimony, affidavits and documentary evidence.

16. Because of errors of law occurring at the trial.

17. Because the Court erred in not sustaining the motion of the defendant for a directed verdict of acquittal made after all the evidence in the case had been presented and the State had rested its case.

18. Because the Court erred in refusing to give Instruction No. 1 requested by the defendant.

19. Because the said information does not charge a crime against the laws of the State of Nebraska.

20. Because the said information is not legally sufficient in law in that the same does not allege the offense attempted to be charged in the language of the Statute or in the language of similar import.

21. Because the information pleads conclusions and does not set forth facts.

22. Because the information is duplicitous and charges a number of offenses in one count and does not charge specifically one offense in one count as required by law.

23. Because the information is vague, indefinite and uncertain in its attempt to charge the alleged offense.

24. Because the information is not sufficiantly specific, definite and certain so as to satisfy the requirements of the Constitution of the State of Nebraska and particularly Section 3 of Article I thereof, which insofar as applicable provides that "No person shall be deprived of .... liberty .....without due process of law." And, is also violative of Section 11 of Article I of the Constitution of the State of Nebraska, which insofar as applicable provides that "In all criminal prosecutions the accused shall be informed of the nature and cause of the accusation made against him."

25. Because the information filed herein is violative of defendant's rights under the Constitution of the United States of America, and principally that part of Section 1 of Article XIV, which insofar as applicable provides as follows: "Or shall any State deprive any person of life, liberty or property without due process of law."

THIS PAGE BOUND VERTICAL IN BOOK

26. Because if the laws of the State of Nebraska permit the filing of an information such as has been filed in the instant case, same are unconstitutional and void for not being legally informative and amount to denial of due process of law guaranteed to this defendant under Section 3 of Article I of the Nebraska Constitution and they also violate that part of Section 1 of Article XIV of the United States Constitution relating to due process of law, both of which state and federal constitutional provisions have heretofore been specifically set forth in this pleading and are incorporated by reference in this paragraph as fully and completely as if herein specifically set forth.

27. Because the trial court erred in overruling the motion for a new trial.

28. That all references made herein to the information are intended to and do apply to the amended information as well as the original information.

29. Because the Court erred in permitting the filing of an amended information.

30. Because the Court erred in overruling the demurrer of the plaintiff in error to the information and the amended information.

31. Because the Court erred in overruling the motion of the plaintiff in error for a directed verdict or the alternative that the jury be discharged.

32. The Court erred in overruling the amended motion for a directed verdict of dismissal.

The above allegations are part of the transcript in the petition in error as submitted to the Supreme Court of the State of Nebraska, and the Petitioner humbly begs that the high tribunal of the United States please consider the fairness and truthfulness of the petition, and allegations and request for dismissal of this case.

THIS PAGE BOUND VERTICAL IN BOOK

It was unexpected and unbelievable to receive word that the Supreme Court of the State of Nebraska affirmed the decision of the District Court of Douglas County, Nebraska. I investigated and was told by a former attorney general of the State of Nebraska that the attorney general's assistants are instructed to support the County Attorney's office, and the affirming decisions of the lower court is a natural procedure.

I was frightened as to the consequence, when I received information that Writ of Certiorori was first denied by the Supreme Court of the United States. However, the rules for petition for rehearing of petition of writ of Certiorori which allows the privilege of submitting additional evidence not previously presented has definitely given the petitioner encouragement to fight on for his rights to which he feels justly entitled. Being without funds to employ attorneys qualified to practice in the Supreme Court of the United States, I found it necessary to appear pro see.

Now comes the Petitioner and humbly begs for freedom and liberty and peace of mind -- in order that he again may establish his business, or go to work for others and make a respectable livelihood for his wife and children, and also pay his debts. His family innocently has suffered -- more than is humanly possible -- the torture and branded record of accusation is a direct reflection to the family, and unless we get immediate relief from this honorable Supreme Court of the United States, I see no reason for my continuing to live in such an atmosphere of injustice. This trouble has taken more than 10 years of my life, and has aged my wife to gray hair, and almost broken up our home and family life.

I am not an attorney, and I do not know the legal procedure of the Court. However, permit me to humbly ask the honorable Court to please

THIS PAGE BOUND VERTICAL IN BOOK
COPY BOUND CLOSE IN CENTER

guide me and help me.

My anxiety and patience have been terribly strained -- for my suffering at the present is worse than death. I am not asking for anything that I am not entitled to under the laws of our land. There has been a flagrant miscarriage of justice, which must be corrected, and liberty and freedom be restored to an innocent man.

The Petitioner humbly begs that the honorable Supreme Court of the United States please be considerate and grant him his freedom as soon as possible, and direct the lower court to dismiss the case, or grant him a new trial, wherein he can prove his innocence.

Life without liberty and freedom is un-American, and to me it is worse than death.

The pleadings submitted herein are all in good faith, and hope the guardians of the laws of our land, who are respected by all the world, can find it possible and within their jurisdiction to recognize the great injustice that has been done to an innocent man.

Within the authority of the great honorable Court of the United States is entrusted the destiny, life, liberty and freedom of the Petitioner.

Respectfully and humbly submitted,

Hiram Dworkin
pro se